IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs

WALTER BARNETTE, PAUL STULL and LUCY McCLURE,

Appellees.

BRIEF OF THE AMERICAN LEGION, Amicus Curiae

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AUTHORITY OF THE AMERICAN LEGION TO FILE BRIEF AS AMICUS CURIAE IN THIS CAUSE

The American Legion, as Amicus Curiae, filed with the Clerk of this Court the written consent of the parties to this Cause, authorizing it to file a Brief as Amicus Curiae herein as required by Section 9 of Rule 27 of this Court.

OPINIONS BELOW

The opinions of the court below are reported in 47 Fed. Supp. (Adv.), page 251.

JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this

Court. Jurisdiction is invoked under Section 380, Title 28, U. S. C. A. Probable jurisdiction was noted January 4, 1943 (R. 62).

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 U. S. C. A. 380). The suit involves the constitutionality of a regulation or order promulgated by the West Virginia State Board of Education under the provisions of Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931 (Appendix A), and subject to the provisions of Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as last amended (Appendix A-1), and Section 9, Article 2, Chapter 18 of the Code of West Virginia, as amended by Chapter 38, Acts of the Legislature, 1941 (Appendix A-2). The regulation of the Board (Appendix B) requires children and teachers in the public schools to salute the American flag and provides that such salute become a regular part of the program of activities in the public schools, with the further provision that refusal to salute the flag be regarded as an act of insubordination to "be dealt with accordingly." Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as amended (Appendix A-1), provides, among other things, that failure of a child to comply with the established regulations of the State Board of Education shall result in refusal of further admission of the child to school until such regulations are complied with.

Suit was instituted August 19, 1942, in the District Court of the United States for the Southern District of West Virginia by three persons belonging to the sect known as "Jehovah's Witnesses," the parents of children attending the public schools of West Virginia, against the Board of Education of the State of West Virginia; claiming Federal jurisdiction because the regu-

lation or order of the Board was a denial of religious liberty and was violative of rights which the First Amendment to the Federal Constitution protected against impairment by the Federal Government, and which the Fourteenth Amendment thereof protected against impairment by the states (R. 16); and further claiming jurisdiction in equity because of the absence of an adequate remedy at law (R. 15). The suit was brought by plaintiffs (appellees) in behalf of themselves, their children and all other persons in the State of West Virginia in like situation. The purpose of the suit was to secure an injunction restraining the West Virginia Board of Educaton (appellants) from enforcing against them an order or regulation requiring children in the public schools to salute the American flag (R. 1-16). The case was heard on application of appellees for an interlocutory injunction, but the parties to the suit agreed that it be submitted for a final decree on the bill of complaint and the motion of appellants to dismiss the bill.

Appellants moved to dismiss the bill on the grounds that the regulation of the Board was a proper exercise of power vested in it by the Legislature of the State of West Virginia; that under the doctrine of the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, the salute of the flag required by it could not be held to be a violation of religious rights of plaintiffs; and that the bill presented no substantial Federal question arising under the Constitution of the United States and involved no substantial Federal question because of the decision of this Court in the case of *Minersville School District* v. *Gobitis*, which decision had not been modified or overruled, and because there was no act of the Congress of the United States which undertook or purported to legislate with respect to the nature of the allegations contained in the complaint (R. 43-45).

It was and is the contention of appellees that to salute the flag, as required by the regulation of the Board, would do violence to the commands of Almighty God, according to Chapter 20 of the Book of Exodus (R. 3).

Disposition of Case by Trial Court

The court below determined that the regulation of the Board of Education, insofar as it required a salute to the flag from school children who have conscientious religious scruples against giving such salute, is violative of the rights of religious liberty guaranteed by the Fourteenth Amendment against infringement by the state; that plaintiffs were entitled to an injunction restraining the Board of Education, its agents and employees and all teachers in the schools of the state from requiring plaintiffs' children, or the children of other persons for whom the suit was brought and having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give the salute (R. 47-48).

Findings of Fact

Inasmuch as the case was submitted for decision upon the allegations of the bill of complaint and the averments of the motion to dismiss the same, the District Court summarized certain facts appearing therefrom. The court

> 1. That this is a suit to protect rights and privileges guaranteed by the 14th Amendment to the Constitution of the United States and the matter in controversy exceeds the sum or value of $3,000.00.
>
> 2. That plaintiffs are citizens of West Virginia and have children who attend the public schools of that state.
>
> 3. That plaintiffs and their children are members of a sect known as "Jehovah's Witnesses" and, as such, have conscientious scruples based on religious grounds against saluting the flag of the United States or any other national flag.

4. That the defendant, the West Virginia State Board of Education, has adopted a regulation requiring children in the public schools of the state to salute the flag of the United States and providing for their expulsion from school upon failure to give such salute.

5. That because of their conscientious scruples based on religious belief, plaintiffs and their children will not comply with the regulation of the Board of Education requiring the flag salute, and that the Board of Education unless restrained will expel plaintiffs' children from school for failure to comply therewith.

6. That, upon the expulsion of plaintiffs' children from school, they will be deprived of the benefit of education in the public schools to which they are entitled under the laws of West Virginia, and plaintiffs will have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to schools.

7. That this suit is brought by plaintiffs in behalf of themselves and all other persons similarly situated with respect to the enforcement of the regulation of the Board of Education.

Final Judgment

The court below in its final decree of October 6, 1942, awarded a permanent injunction restraining and inhibiting appellants from requiring the children of appellees, or any other children having religious scruples against such action, to salute the flag of the United States or any other flag, or from expelling such children from the public schools of the state for failure to salute it, as prayed for in plaintiffs' bill of complaint (R. 45-46).

SPECIFICATION OF ERRORS RELIED UPON

The American Legion as Amicus Curiae will rely upon the assignment of errors filed with the petition for appeal (R. 57) as constituting also the points stated to be relied upon (R. 60):

1. The Court erred in overruling defendants' motion to dismiss plaintiffs' complaint for want of jurisdiction.

2. The Court erred in holding, as a conclusion of law, that the regulation of the West Virginia State Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of religious liberty guaranteed by the 14th Amendment against infringement by the states.

3. The Court erred in holding, as a conclusion of law, that plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

4. The Court erred in awarding the permanent injunction prayed for in the plaintiffs' bill.

5. The decision of the Court is counter to a decision of the Supreme Court of the United States handed down on June 3, 1940, in the case of *Minersville School District, Board of Education of Minersville School District, et al., Petitioners, v. Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend*, reported in 310 U. S. 586, 84

Law. ed. 1375, which said decision has in no manner been overruled or modified.

SUMMARY OF ARGUMENT

I

The appellants' motion to dismiss the Bill of Complaint should be sustained as no substantial Federal question is involved.

Ex parte Poresky, 290 U. S. 30, 32;
Louisville & Nashville Railroad Company v. *Garrett*, 231 U. S. 298;
Utley v. *City of St. Petersburg*, 292 U. S. 106;
Leoles v. *Landers*, 302 U. S. 656;
Hering v. *State Board of Education*, 303 U. S. 624;
Minersville School District, et al. v. *Gobitis*, 310 U. S. 586, 594, 595.

II

House Joint Resolution 303 (Appendix C) does not supersede the Flag Salute Regulation adopted by appellants.

House Joint Resolution 303, Public Law 623, 77th Congress (second session), passed and approved June 22, 1942 (Appendix C).
Barnette et al. v. *The West Virginia State Board of Education*, 47 Federal Supp. 251, 255.

III

The regulation adopted by the West Virginia State Board of Education adheres to the principles enunciated by this Court and in no respect departs from or attempts to enlarge upon those principles.

Minersville School District, et al. v. *Gobitis*, 310 U. S. 586;
Haiter v. *Nebraska*, 205 U. S. 34, 42, 43.

IV

The regulation of the West Virginia State Board of Education was designed to promote national security without which the free exercise of religious beliefs would ultimately fail.

Halter v. *Nebraska*, 205 U. S. 34, 35;
Hamilton v. *University of California*, 293 U. S. 245, 266, 268;
Minersville School District, et al. v. *Gobitis*, 310 U. S. 586, 593.

V.

The Salute to the Flag and the Pledge of Allegiance as required by the regulation of the State of West Virginia Board of Education is not a religious rite and therefore not in conflict with the exercise of the religious views of the appellees.

People ex rel. Fish v. *Sandstrom*, 279 N. Y. 523-529, 530;
Bleich v. *Board of Public Instruction*, 139 Fla. 43-45, 190 So. 815.

ARGUMENT

I.

The Appellants' Motion to Dismiss the Bill of Complaint Should be Sustained as no Substantial Federal Question is Involved

The bill of complaint in this case alleges that the regulation promulgated by appellants requiring a salute to the Flag and the statutes of West Virginia pursuant to which such regulation was adopted violate the First and Fourteenth Amendments to the Constitution of the United States. Whether a substantial Federal question

is presented must be determined from a consideration of the allegations contained in the bill of complaint. *Ex parte Poresky*, 290 U. S. 30. In this case the court made the following observation:

> "• • • The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' • • •"
>
> *Ex parte Poresky*, 290 U. S. 30, 32.

In the further case of *Louisville & Nashville Railroad Company v. Garrett*, 231 U. S. 298, it was held that unless the Federal question is substantial, the jurisdiction fails.

In the case of *Utley v. City of St. Petersburg, Florida*, 292 U. S. 106, the court laid down the principle that no substantial Federal question forming a basis for review by this court was presented by the contention of invasion of a constitutional right where such question had been settled by previous decision of this court.

In the case of *Leoles* v. *Landers*, 302 U. S. 656, the validity of a regulation of the School Board of Atlanta, Georgia, requiring all pupils attending public schools to participate in certain patriotic exercises, including an individual salute to the Flag by each pupil, was involved. In the further case of *Hering* v. *State Board of Education*, 303 U. S. 624, the validity of a statute of New Jersey providing that every Board of Education should require the pupils to salute the Flag and repeat the Pledge of Allegiance every school day, was in question. In each of these cases substantially the same constitutional question presented in the instant case was involved, and in each case this court dismissed the appeal for the want of a substantial Federal question.

In the case of *Minersville School District, et al* v. *Gobitis*, 310 U. S. 586, 594, 595, which is the last expression of this court on the question presented in the bill of complaint, the court in an exhaustive opinion determined the question in controversy herein in the following language.

> " " " The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate. Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 62 L. ed. 349, 38 S. Ct. 159, L. R. A. 1918C 361, Ann. Cas. 1918B 856; Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197. In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legis-

> lature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. * * *"

This case discusses and decides every substantial point raised by the appellees in their bill of complaint and expressly holds that a requirement that children attending public schools participate in a ceremony requiring a salute to the Flag and the Pledge of Allegiance does not infringe upon the due-process of law clause of the Constitution of the United States in its guarantee of religious liberties under the Fourteenth Amendment

II

House Joint Resolution 303 (Appendix C) Does Not Supersede the Flag Salute Regulation Adopted by Appellants

The appellees in their bill of complaint have advanced the contention that House Joint Resolution 303, Public Law 623, 77th Congress (2nd session) approved June 22nd, 1942 (Appendix C) supersedes Section 5, Article 2, Chapter 18 (Appendix A); Section 5A, Article 8, Chapter 18 (Appendix A-1), Section 9, Article 2, Chapter 18 (Appendix A-2) of the Code of West Virginia, 1931, as amended, and the regulation of the West Virginia State Board of Education (Appendix B) promulgated pursuant thereto. (Record—Pages 11 and 12.)

The court below disposed of this question in the following language:

> "We are not impressed by the argument that the powers of the School Board are limited by

> reason of the passage of the joint resolution of June 22nd, 1942, pertaining to the use and display of the flag."
>
> *Barnette et al.* v. *The West Virginia State Board of Education*, 47 Federal Supp. 251, 255.

We believe this is a sound conclusion. A careful examination of that resolution discloses that it was adopted merely for the purpose of codifying and emphasizing existing rules and customs pertaining to the display and use of the Flag of the United States of America and the resolution does not attempt to establish any new rules or customs not already recognized as being in existence. It is not mandatory and does not attempt to outline a course of conduct to be observed by children attending public schools as it only codifies customs and rules for proper respect to the Flag when it is being hoisted or lowered, or when it is passing in a parade or in a review. Section 5 of the Act is as follows:

> "That during the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes." (Appendix C.)

We do not believe that this resolution was intended to carry the force or effect given it by the appellees and that it in no way conflicts with the West Virginia statutes or the regulation of the West Virginia State Board of Education in question.

III

The Regulation Adopted by the West Virginia State Board of Education Adheres to the Principles Enunciated by This Court and in no Respect Departs from or Attempts to Enlarge Upon Those Principles

The preamble of the regulation of the West Virginia State Board of Education, reads in part as follows:

> "WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but
>
> WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported." • • •

The regulation, of which the foregoing excerpt is a part, was adopted June 9th, 1942. Apparently, the purposes to be effected by such regulation were primarily based on the sound fundamental principles laid down in the case of *Minersville School District, et al.* v. *Gobitis*, 310 U. S. 586, decided by this court June 3rd, 1940. A careful comparison of said regulation with the opinion expressed by the court in the above case clearly discloses that the West Virginia State Board of Education had directly in mind the promotion of national unity and solidarity, both of which are recognized as proper functions of the state in said opinion. The language employed in said regulation in many respects is taken verbatim from said opinion. The object to be accomplished thereby is expressly approved in said case.

The right of a state to strengthen patriotism and the love of country among its people by legislation encouraging respect for the flag has long been recognized. In the case of *Halter* v. *Nebraska*, 205 U. S. 34, the court made the following comment:
at pages 42 and 43 of said opinion made the following comment:

> "So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. * * * * * that to every true American the flag is the symbol of the nation's power,—the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably

> be affirmed that a duty rests upon each state in every legal way to encourage its people to love the Union with which the state is indissolubly connected."

Thus the duty of strengthening the bonds of the Union is not alone a Federal function, but must be shared by each state and its citizens if the ultimate in national unity is to be attained. The West Virginia State Board of Education in adopting the regulation in question was not attempting to set up a state religion, nor was it attempting to abridge the right of individual citizens to the free exercise of their personal religious belief. The purpose was entirely different; it was not restrictive, but affirmative in character, the promotion of national unity. The results to be obtained in nowise transcended or indicated a trend in excess of the principles enunciated by this court in the case of *Hatter* v. *Nebraska*, 205 U. S. 34 and *Minersville School District, et al* v. *Gobitis*, 310 U. S. 586. We realize that possibly in times of great national emergency, prejudiced majorities might seize upon expressions made by this court, to advance their cause against helpless minorities and attempt to place a construction on such expressions which was never intended. When such practices occur, we are content to rest the judgment of such action with the sound discretion of this court. The regulation in question, however, is neither an attempted departure from, nor extension of the principles announced by the court. It is merely the exercise of a function adopted in conformance therewith for the promotion of a great common end, national cohesion. It is not designed to establish or restrict religious beliefs, but for the advancement of "an interest inferior to none in the hierarchy of legal values." As stated by the court in the case of *Minersville School District, et al.* v. *Gobitis*, 310 U. S. 586-595, to-wit:

> "National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. Compare Schneider v. Irvington, 308 U. S. 147, ante, 155, 60 S. Ct. 146."

Doubtless, thousands of communities have adopted the salute to the Flag and the Pledge of Allegiance as a part of the training in the school room since the decision in *Minersville School District et al.* v. *Gobitis*, 310 U. S. 586 and this expression of patriotism has now become an accepted movement in the formative period of the child's education for the development of future citizenship. It would be going very far to say that the regulation in question had no reasonable connection with the common good and was not promotive of a sound public policy or that it did not strengthen national security without the preservation of which the very rights for which the appellees contend would ultimately be destroyed.

IV

The Regulation of the West Virginia State Board of Education was Designed to Promote National Security Without Which the Free Exercise of Religious Beliefs Would Ultimately Fail

The Regulation of the West Virginia State Board of Education (Appendix B) was designed to promote national security. The exercise of this function by a state is recognized in the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, 596 in the following language:

> "Unlike the instances we have cited, the case before us is not concerned with an exertion of the legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."

The events which have transpired in our national life since the rendition of this decision have demonstrated that an adequate national defense is not alone concerned with armies and navies and matters distinctly military in character, but includes as well, the moral strength or public opinion of its citizens. This is vital to the maintenance of national security. Government can be destroyed more quickly by assaults from within than by attack from without. Nations have been destroyed by a break down in the public morale. Consequently, the state through its educational institutions is justified in adopting measures which will engender patriotism in the young people, who will represent the succeeding generations, for the great task of preserving the foundations upon which freedom of religious expression is founded. The paramount issue in the United States within the past two years has been national unity against forces which, if they were successful, would destroy the liberties upon which freedom of religion is based. This issue has permeated our entire structure from the National Government down to the smallest community.

The individual citizen has been impressed with the fact that his duty in this respect is of prime importance. The movement has no element of hysterics, but is predicated on the sound premise that the national conscience must be made aware of the necessity for national cohesion if we are to have national security. A state is not required to wait until the danger to public welfare is imminent, but may adopt sound measures to correct an evil in its inception. The regulation in question is not a war-time measure, but quite the contrary. It was designed to promote through educational means a better citizenship for the future and thus guarantee national security for succeeding generations.

It cannot be said that this regulation does not promote the common good in view of the fact that during the past few years we have witnessed the fall of many nations composed of liberty-loving people because their national security was not adequate.

The legislative body of a state has the right to establish and promote a sound public policy under the Tenth Amendment to the Constitution, and the courts have been slow in restricting the exercise of this right excepting in cases where some other right equally precious has been at stake.

> *Halter* v. *Nebraska*, 205 U. S. 34, 35;
> *Hamilton* v. *University of California*, 293 U. S. 245, 266;
> *Minersville School District* v. *Gobitis*, 310 U. S. 586, 593.

In the case of *Hamilton* v. *University of California*, 293 U. S. 245, Associate Justice Cardoza in a concurring opinion at page 266 of that decision made the following comment in this connection:

> "This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely

> ethical. More must be shown to set the ordinance at naught. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law."

The freedom to follow conscience is a relative right, and while it may be exercised freely when not in conflict with some other right equally as well recognized, yet it must give way to the superior authority of a free people to adopt legislative policies which have for their ultimate purpose the very preservation of such right.

In discussing this right of the individual, Associate Justice Cardoza in the above cited case of *Hamilton* v. *University of California*, 293 U. S. 245, at page 268 stated as follows:

> "The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

V

The Salute to the Flag and the Pledge of Allegiance as Required by the Regulation of the State of West Virginia Board of Education is not a Religious Rite and Therefore not in Conflict with the Exercise of the Religious Views of the Appellees

The salute to the Flag and the Pledge of Allegiance required of the school children under the regulation adopted by the West Virginia State Board of Education (Appendix B) is not a requirement pertaining to reli-

gion. The salute to the Flag by the placing of the right hand upon the breast is an act of respect of the highest order to the symbol of freedom. It in no way conflicts with the individual's freedom to worship Jehovah and was never intended to conflict therewith. It merely recognizes that the Flag represents the freedom upon which religious liberty rests—one of the most beloved rights yet developed by a political society. This salute does not engender in the mind of the individual the thought that the Flag is an image to be worshiped, or that it is a part of a religious rite. To assume such a position would be an admission that human emotions involving acts of respect and devotion all fall in the same category, and yet human experience teaches that this is not true. The devotion to Jehovah is as distinguishable from an act of respect towards the Flag as the love which a man bears to a devoted wife is different from the devotion he bears to his children. Nor is the Pledge of Allegiance a restriction upon the appellees exercise of their religious beliefs. A pledge is a promise (see Webster's New International Dictionary, Second Edition) as distinguished from an oath which might be termed a declaration invoking the Supreme Power. If the term "promise" is substituted for the word "pledge" in respect to the Pledge of Allegiance, it would read as follows:

> "I promise allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation indivisible, with Liberty and Justice for all."

Thus, the individual making this pledge merely promises allegiance to the symbol of freedom and to the Republic which has exalted that freedom under which religious liberties are protected. It is a pledge of support to a political system which has established the right to worship Jehovah as the individual conscience dictates. The distinction is clearly pointed out in the recent cases of: *People ex rel. Fish* v. *Sandstrom*, 279 N. Y. 523, 529,

530; *Bleich* v. *Board of Public Instruction*, 139 Fla. 43, 45, 190 So. 815. Consequently, the salute to the Flag and the Pledge of Allegiance are promotive of the appellees rights and not restrictive, as they contend. A construction should be given to this ceremony in keeping with its intended purposes and in accord with the end to be accomplished.

VI

Legion's Position

The American Legion is interested in the preservation and promotion of national security, yet also believes in the preservation and protection of individual religious freedom as given by the First and Fourteenth Amendments to the Constitution and that this right should always be given freedom of expression except where it may conflict with the rightful exercise of that authority under which such freedom was created and through which it is protected.

The Preamble to the Legion's Constitution is prefaced with the clause: "For God and Country we associate ourselves together for the following purposes." The Preamble contains the following precepts

> "To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred per cent Americanism; to preserve the memories and incidents of our association in the Great War; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to posterity the principles of Justice, Freedom and Democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness."

Our organization is composed of more than one million members who fought abroad and served at home in the last War in order to preserve and perpetuate our national security, upon which all of the freedoms which the individual citizen enjoys, is predicated. We therefore believe that when this security is involved it should be given prime consideration. Consequently, we feel that the regulaton in question, being promotive of national security, should be upheld.

VII

CONCLUSIONS

It is respectfully submitted:

(1) That appellants' motion to dismiss the bill of complaint should be sustained.

(2) That the flag salute regulation promulgated by appellants and the statutes of West Virginia affording a basis in law therefor, does not violate any of the provisions of the Constitution of the United States.

(3) That this Court in well-considered decisions has determined all of the questions raised in this case adversely to the contentions of appellees.

(4) That neither the West Virginia statutes nor the regulation of appellants complained of by appellees has been superseded by any act of the Congress of the United States.

(5) That the judgment appealed from should be reversed.

Respectfully submitted,

RALPH B. GREGG,

National Judge Advocate and General Counsel for The American Legion, Amicus Curiae.

APPENDIX A

Section 5, Article 2, Chapter 18, Code of West Virginia, 1931:

General Powers and Duties.—Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia university, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, retirement fund for teachers, school attendance, evening and continuation or part time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the purchase, distribution and care of free textbooks by the district boards of education, the general powers and duties of county and district boards of education, and of school trustees, teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the board to be necessary and expedient.

APPENDIX A-1

Section 5-a, Article 8, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 32, Acts of the Legislature, Reg. Sess., 1941:

Child Dismissed, Suspended, or Expelled from School for Failure to comply with Requirements and Regulations Treated as Unlawfully Absent.—If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school.

APPENDIX A-2

Section 9, Article 2, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 38, Acts of the Legislature, Reg. Sess., 1941:

Courses of Instruction in History, Civics, Constitutions, Alcoholic Drinks, Narcotics; Textbooks on Health, Biology and Social Sciences to Contain Appropriate Materials on Effects of Alcoholic Drinks and Narcotics; Violations; Penalties.—In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.

* * *

Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding ten dollars for each violation, and each week during which there is a violation shall constitute a separate offense. If the person so con-

victed occupy a position in connection with the public schools, he shall also automatically be removed from such position, and shall be ineligible for reappointment to that or a similar position for the period of one year.

APPENDIX B

Regulation of the West Virginia State Board of Education, adopted June 9, 1942:

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assures generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant con-

verns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

APPENDIX C

House Joint Resolution 303, Public Law 623—77th Congress (second session), passed and approved June 22, 1942:

Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America be, and it is hereby, established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States.

• • •

Sec. 5. That during the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes.